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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Khalil Rushdan,) No. CV 05-114-TUC-FRZ
10 Petitioner,) **ORDER**
11 vs.)
12 Charles Ryan, et al,)
13 Respondents.)
14

15 Before the Court for consideration is the Petition for Writ of Habeas Corpus pursuant
16 to 28 U.S.C. § 2254 filed by Petitioner Khalil Rushdan, by and through counsel; Petitioner's
17 Motion for Reconsideration of Voluntariness Claim; and the Report and Recommendation
18 of the Magistrate Judge, recommending that this Court issue an Order conditionally granting
19 the Petition for Writ of Habeas Corpus.

20 This matter was referred to Magistrate Judge Jacqueline Marshall pursuant to Rules
21 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings and report and
22 recommendation.

23 Magistrate Judge Marshall issued her Report and Recommendation, specifically
24 recommending the following:

25 . . . that the District Court, after its independent review, issue an Order
26 **denying** Petitioner's claims of actual innocence and insufficiency of the
27 evidence, **granting** Petitioner's claims of vindictive prosecution and
28 involuntary statements, **granting** the Motion for Reconsideration of
Voluntariness Claim (Doc. 121), and **granting** the Petition for Writ of Habeas
Corpus (Doc. 1) if, within one hundred and twenty (120) days from the date
the Judgment becomes final, or 120 days after appellate proceedings have

1 concluded (whichever is later), the state has not to file charges against
2 Rushdan.

3 The Report and Recommendation sets forth a thorough factual and procedural history
4 of Petitioner's state court proceedings and the conviction at issue, and further sets forth in
5 detail the procedural history of this case, including discovery, a tentative settlement that was
6 not finalized, and the evidentiary hearing on the issues raised. The Report and
7 Recommendation provides an in-depth analysis of the claims and issues presented.

8 Following extensive briefing and evidentiary hearing, Magistrate Judge Marshall
9 concluded "that the psychological coercion brought to bear upon Rushdan produced the
10 statements that led to the conviction" and "was not 'the product of a rational intellect and free
11 will.' It was not voluntary. *See United States v. Andaverde*, 64 F.3d 1305, 1313 (9th Cir.
12 1995)." ¹ Accordingly, Judge Marshall recommends that this Court "find that the trial court's
13 conclusion was a decision that was 'contrary to, or involved an unreasonable application of,
14 clearly established Federal law,' as is required for habeas relief under 28 U.S.C. §
15 2254(d)(1)."

16 The parties filed objections to the Report and Recommendation pursuant to 28 U.S.C.
17 §636(b).

18 Respondents filed their objections urging the Court not to adopt the Report and
19 Recommendation with respect to the Petitioner's claims of vindictive prosecution and
20 involuntary statements and deny the petition.

21 Petitioner also filed objections, arguing that the Magistrate Judge erroneously denied
22 relief on his claim that he is legally and factually innocent of first degree murder and further
23 erred in failing to grant evidentiary development on this claim.

24 Petitioner argues that he is being held in violation of his rights to due process because
25 there is insufficient evidence to support his conviction.

26 Petitioner requests that this Court "1) adopt Magistrate Judge Marshall's findings and
27 recommendation and grant the writ on Mr. Rushdan's vindictive prosecution and

28 ¹Report and Recommendation, page 25.

1 voluntariness claims; 2) find Mr. Rushdan is likewise entitled to relief on his actual
2 innocence and insufficiency of the evidence claims, and; 3) find Mr. Rushdan is entitled to
3 immediate and unconditional release for the state's misconduct."

4 The Court finds, after consideration of the matters presented and an independent
5 review of the record herein, including the Petitioner's and Respondents' well plead and
6 detailed objections to the Report and Recommendation, that Petitioner's claims of actual
7 innocence and insufficiency of the evidence should be denied; Petitioner's claims of
8 vindictive prosecution and involuntary statements be granted; that Petitioner's Motion for
9 Reconsideration of Voluntariness Claim also be granted; and that the Petition for Writ of
10 Habeas Corpus be granted conditionally.

11 Based on the foregoing,

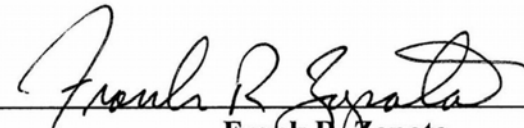
12 IT IS ORDERED that Petitioner's Motion for Reconsideration of Voluntariness Claim
13 (Doc. 121) is GRANTED;

14 IT IS FURTHER ORDERED that Magistrate Judge Marshall's Report and
15 Recommendation [Doc. 148] is hereby ACCEPTED AND ADOPTED as the findings of fact
16 and conclusions of law by this Court;

17 IT IS FURTHER ORDERED that the Petition for Writ of Habeas Corpus is
18 conditionally GRANTED; accordingly

19 IT IS FURTHER ORDERED that if, within one hundred and twenty (120) days from
20 the date the Judgment becomes final, or 120 days after appellate proceedings have concluded
21 (whichever is later), the state has not filed charges against the Petitioner, the Petition for Writ
22 of Habeas Corpus shall be GRANTED unconditionally.

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24 DATED this 21st day of September, 2011.

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28 Frank R. Zapata
Senior United States District Judge